JR/885/18

Upper Tribunal

Immigration and Asylum Chamber

Judicial Review Decision

The Queen on the application of
SM
(a minor, by her litigation friend AM)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Bruce

Application for judicial review: substantive decision

Having considered all documents lodged and having heard from the Applicant's representative, Ms A. Weston QC of Counsel instructed by Central England Law Centre, and the Respondent's representative Mr Z. Malik of Counsel instructed by the Government Legal Department, at a hearing at Birmingham Civil Justice Centre on the 20th February 2019

Decision: the application for judicial review is granted.

Background and the Decision of the Secretary of State

1. This claim concerns the decision of the Secretary of State to refuse to grant the Applicant (SM) indefinite leave to remain. SM is today 16 years old. At the date of the decision she was 15.

2. The facts are not in issue.

3. SM was born in Pakistan in December 2002. She lived there with her mother (AM) and father until in 2005 the family came to live in the United Kingdom. AM had leave to enter as a Tier 4 (General) Student Migrant; SM and her father were Tier 4 dependents. Approximately one year after their arrival the relationship between AM and SM's father started to break down. In her witness statement SM recalls seeing her father behave violently in the home and has a "horrible memory" of him locking her in a room. This early exposure to domestic violence perpetrated by her father was the first in a line of traumatic experiences for SM.

4. SM's parents divorced, and a bitter and acrimonious custody battle ensued. By an order sealed on the 30th January 2012 the Family Division of the High Court ordered that SM was to live with her mother, and not be removed from the jurisdiction without the written consent of her father or leave of the court. Being at the centre of this custody dispute was the second challenging life event faced by SM.

5. After the divorce SM and AM lived together in a string of different places. In her witness statement AM describes being at her "wits end" during this period. She still had Tier 4 status at that time, and unable to work or claim benefits she had been reliant on intermittent support from her family in Pakistan. She had, in her own words, ended up in exploitative relationships with men as a means to securing financial support for herself and her daughter. Today she feels "humiliated and ashamed" of the fact that SM witnessed some of these men being abusive towards her. SM herself describes this difficult period in her life as follows:

> "my mother and I have had issues regarding our immigration status since my early childhood which meant it was never the same for me as any other ordinary kid's life. My mother wasn't allowed to work which meant I faced a rough childhood with a lot of moving about into different houses in different cities and joining new schools so it was hard for her to make ends meet and hard for me to cope with the constant change.
>
> At an age where most little girls would worry about toys and dolls I would worry about whether I would have a place to

> spend the night or even see my mother because of the court case my father had filed…."

This period of poverty, instability and further domestic violence was the third difficulty that SM faced growing up.

6. In 2013, when SM was 11, her mother remarried. AM's second husband is British and is the father of SM's two younger brothers, who were born in 2014 and 2015. AM explains that when she met her second husband the relationship was at first a good one, but as time went on it became clearer and clearer that he resented SM. He would for instance provide things for his sons but not SM. He would emotionally abuse SM and her mother by referring to their lack of immigration status; SM also witnessed AM being physically assaulted by him. Her poor relationship with her step-father, and his abusive behaviour towards her and her mother, was SM's fourth ordeal.

7. Shortly after her mother married this man SM started secondary school. SM states that she has persistently been the victim of bullying at school which would take place both online and in person. This is confirmed by her school who consider that she has been vulnerable since she started there. In a 2017 'Child in Need' referral from her school to Birmingham City Council, SM's headteacher states that from year 7 on SM has been the victim of teasing and name calling by boys in her class and that SM was "unable to cope" with this. Although the school took action, moving both SM and the boys involved, it persisted and "spread quite widely", to include "several incidents involving nasty posts online". In her statement SM explains that at least some of this bullying has centred on her immigration status:

> "Lots of the friends I had as I was younger or now don't know about my immigration situation. They all think I am a British citizen just like them but I find it is an embarrassment because no teenager would understand why or how I still haven't qualified to become a British citizen when I have lived in the country since reception to now when I'm going into my GCSEs. My precarious immigration status is a source of shame to me and I just find it really difficult to disclose my circumstances, even to my closest friends. My fear is that they will just think I am "a freshie". In fact, I recently fell out with one of my best friends who I have told about my status because that information was passed on to some boys in my class. They bullied me about my status and I have received some nasty social media posts as a result of it. I felt humiliated because of the nasty things they were saying to me that were linked to my immigration status".

This persistent bullying, much of it linked to her immigration status, is the

fifth source of distress for SM.

8. SM has been back to Pakistan on two occasions since she arrived here in 2005. In November 2015 she returned because her grandmother had died. In February 2017 SM and AM were required to return to Pakistan in order to attend a court hearing, after her father started fresh custody proceedings in the courts there. On the first of these visits SM was aged just 13; on the second she was 14½. Despite her young age during both of these trips, SM came under pressure from her paternal family to enter into an arranged marriage. Her father and his family repeatedly told her that she would be married to a cousin in Pakistan. In her statement SM describes in detail the stress that this placed her under:

> "Whilst I was in Pakistan my Dad was telling me that he wanted me to live with him in Pakistan, and that he wanted to make me marry one of his first cousins. I was really sad and upset when I heard him say this and it made me feel anxious and scared all over again. The last thing I want to do is to be forced into marriage to someone that I don't know but also it would mean I would have to live in Pakistan and not in the UK. I really hate my father for doing this to me and making travel to Pakistan to go to court. And I hate him for wanting to force me to marry someone".

The threat of forced marriage is the sixth challenge that SM has had to deal with.

9. It is against this background that SM's school, doctors and social services have repeatedly expressed concerns about her mental health. Her school, in its 'Child in Need' referral, report that they have been dealing with SM's self-harming since 2015. On more than one occasion she has been found to be in possession of a blade whilst at school. She has been found to have made multiple cuts to her body, primarily on her face and arms. The school nurse and teachers have all tried to support SM through this. The school has in the past made a referral to a professional counselling service, and in the request to Birmingham City Council Children's Services they express the view that SM's mental health is "deteriorating". Of her self-harming SM says this:

> "… I felt I had to try and be really mature or try to handle situations and events other kids my age wouldn't have to go through. This really affected me emotionally and I started to self-harm as a coping strategy. The self-harming is the time when I feel I am in control of what I'm doing. It is the only time that I feel that I'm in control. I know that it is wrong and I know that it upsets my mum but it is something that I know I can do to give me a release and make me feel that I am the one

who is making decisions. I have never been able to make decisions and I have always had to watch other people make decisions for me and my mum, including the court and the Home Office and my dad and other members of the family and the community".

10. SM goes on to give an example of how insecurity can lead her to self-harm. Due to an administrative error at the Home Office her biometric residence card was sent to the wrong address. SM explains:

> "I was told that I had been granted limited leave to remain but I did not have the card to prove it and that just made me feel angry sad and upset. I self-harmed as a result of this. It seems that I am just left constantly anxious about the future because I just don't have any certainty".

11. This was the factual matrix presented to the Home Office when, on the 26th June 2017, a Birmingham based charity 'Asylum Support and Immigration Resource Team' (ASIRT) made an application on behalf of mother and daughter. At that stage both AM and SM had Discretionary Leave to Remain, but that leave was due to expire. ASIRT wrote in the following terms:

> "Please find enclosed applications for further leave to remain in respect of [AM], submitted on the basis of her parental relationship to her to British citizen children [SM's two younger brothers]. As you will note [AM] is now sole carer for [her sons], her relationship with the father having broken down due to domestic abuse. [AM] and her children are now assessed as destitute by Birmingham City Council's Children and Families Directorate, and are provided with subsistence support and accommodation - at a domestic violence refuge - by that authority under section 17 of the Children Act. We therefore submit [AM]'s leave to remain request in the expectation that a fee waiver is applicable and enclosed supporting financial information in the form of bank statements confirming that [AM]'s bank statements are presently in excess of £900 overdrawn.
>
> We further draw your attention to the fact that [AM]'s older daughter [SM], also a Pakistani national, is included as [AM]s dependent on this application. As you will note [SM] has been in the UK since the age of three and has therefore spent 12 of the 15 years of her life to date in this country. She therefore meets the requirements of paragraph 276ADE of the immigration rules having been resident in the UK and integrated into the school's education system for well over

seven years.

That being the case, we would draw your attention to the attached evidence of [SM]'s mental instability and her history of self-harm and low self-esteem. As you will note her GP has recommended that her mental instability is of such severity that she should be granted the right of leave to remain on a permanent basis.

While we are aware that general Home Office custom and practice in such instances is to grant leave to remain in 30 months blocs until granting settlement at 10 years, we respectfully submit that such action is not appropriate in this instance, due to the family's destitute circumstances, the history of domestic violence and abuse, the concerns around potential forced marriage and the concerns around [SM]'s poor mental health. We are therefore in this case requesting that the Secretary of State's discretion is used to grant her indefinite leave to remain.

With this in mind we respectfully refer you to the determination SM and TM and JD and others v Secretary of State, [2013] EWHC 1144 (Admin), which found that the welfare and best interests of relevant children must be considered before determining the length of leave to remain to be granted and that the blanket application of a fixed limited period of leave to remain is unlawful. As the judgement noted:

'When making decisions concerning children. Officials must grasp the nettle at the outset and make a realistic appraisal whether it is clear from the outset that a child's future is going to be in the UK and make decisions accordingly'

Given that [SM] has been in the UK for 12 of the 15 years of her life to date and that she has two siblings who are British citizens, it is evident that her life is here in the UK and that her future is here in the UK.

We therefore consider it contrary to her best interests to prolong the instability and precariousness which has characterised her life to date and consider it reasonable to request that the Secretary of State's discretion is used in this instance to grant her indefinite leave to remain, relieving her of the anxiety and uncertainty associated with time-limited leave to remain and allowing her the opportunity to meet her full potential as a schoolchild and to plan for access to further and

higher education."

12. That letter covered the completed application forms (FLR), and a bundle of evidence which included:

- A Prohibited Steps, Contact, Specific Issue and Residence Order, issued under section 8 of the Children Act 1989 by the Family Division of the High Court sitting at Birmingham District Registry on 30 January 2012

- Various documents relating to SM's mental health, including a 'Child in Need' referral from her school to Birmingham City Council (which identifies SM's legal status as a "complicating factor") and the 'Child in Need' plan produced by the council's Children's Services

- A letter dated 8th June 2017 to the UKBA from the Deputy Headteacher of SM's school, who describes her as a "vulnerable child on several levels". The letter expresses concern about consistent self-harming, bullying, the effects of the "nasty custody battle", poor housing and stress. The deputy headteacher concludes:

  > "[SM]'s mental health is deteriorating because of the serious issues facing the family. I would fully support any application for her to remain in the UK where I am sure she has better life chances and will be safe. [SM] is a very able student academically. She came up to secondary school with high SATs levels and is characterised as 'more able'. She has potential to achieve high grades and to go to university if her life settles down and the worry hanging over her about her future is removed".

- A letter dated 14th June 2017 from the family GP. This records that SM is known to suffer from low mood and stress disorder. She has had to visit the surgery after incidents of self-harm. The GP had referred her for mental health support from CAMHS. The doctor concludes: "due to her unstable mental health I feel she would benefit from residing in the UK on a permanent basis with her mother, who she is settled with"

- A letter dated 24th January 2018 from Valerie Gardner, a Victim Caseworker with Victim Support. Ms Gardner explained that she has been supporting SM in relation to incidents of bullying and harassment, incidents that have been serious enough to warrant police involvement. She writes:

> "[SM] has recently been granted a visa for 2½ years and although she is very grateful for that, she is still in a stressful and anxious state because of the uncertainty about her future after that time has passed….based on my work with [SM], I have witnessed how very vulnerable and emotional she is. If she is allowed to stay in the United Kingdom on a permanent basis, she can continue to receive the much needed emotional help and care from her mother and the other agencies that are supporting her at present".

13. The Respondent's decision is dated the 6th November 2017. It says nothing about the foregoing submissions; it does not acknowledge any of the evidence; nor does it make any reference to SM's request for settlement. It simply states that AM and SM are being granted a period of 30 months limited leave to remain, and will be eligible to apply for settlement after completing at least 10 years under this route.

14. By way of letter dated the 5th January 2018 Central England Law Centre notified the Respondent that SM (by her litigation friend her mother AM) wished to challenge the failure to consider her request for indefinite leave. I need not set out the detail of this letter before action, save to say that it complained that none of the evidence, or submissions, summarised above had been addressed by the Respondent's letter of 6th November 2017.

15. On the 14th April 2018 the Respondent replied, explaining that the decision had been reconsidered, and enclosing a new decision letter. The letter begins by setting out why both mother and daughter qualified for limited leave to remain under Appendix FM of the Immigration Rules. AM had qualified for leave as a 'parent' because she has sole responsibility for her two British sons. SM, as a child in AM's care, qualified as a child of a parent with limited leave to remain. The letter then acknowledges that SM has made a request for indefinite leave to remain to be granted, and sets out, over seven bullet points, the reasons why. Ms Weston QC accepts that these bullet points are a fair summary of the case put on behalf of SM.

16. The letter then sets out the applicable policy on 'longer periods of leave'. It was to be found in the guidance document '*Family Migration: Appendix FM Section 1.0b. Family Life (as a partner or parent) and Private Life: 10 year routes*' (August 2015):

> "Settlement in the UK is a privilege, not an automatic entitlement. Unless there are truly exceptional reasons, the expectation is that applicants should serve a probationary period of limited leave before being eligible to apply for

indefinite leave to remain (ILR).

However, there may be rare cases in which either a longer period of leave or an early grant of ILR is considered appropriate, either because it is clearly in the best interests of a child (and any countervailing factors do not outweigh these best interests) or because there are other particularly exceptional or compelling reasons to grant leave for a longer period (or ILR).

If the applicant specifically requests a longer period of leave than 30 months, or ILR, and provides reasons as to why they think a longer period of leave or ILR is appropriate in their case, the decision maker must consider this and set out in any decision letter why a grant of more than 30 months or ILR has not been made.

In cases not involving children (as the main applicant or as family members included in the application), there must be sufficient evidence to demonstrate the individual circumstances are not just unusual but can be distinguished to a high degree from other cases the extent that it is necessary to deviate from the standard grant of 30 months leave to remain.

In all cases the onus is on the applicant to provide evidence as to why they believe that a longer period of leave (or ILR) is necessary and justified on the basis of particularly exceptional or compelling reasons. Where the decision-maker considers that a longer period of leave may be justified the case must be referred to a senior caseworker to consider further. If the decision maker decides that the case is not sufficiently exceptional or compelling, they should grant 30 months' leave to remain, and explain in the decision letter why this has been granted instead of the length of leave requested.

…

In cases involving children (as the main applicant or as family members included in the application), the decision-maker must also have regard to the best interests of the child as a primary consideration (but not the only or the paramount consideration) when deciding the period of leave to be granted.

In some cases it may be appropriate to grant leave on a short-term temporary basis to enable particular issues relating to the child's welfare to be addressed before they leave the UK. If the

grant of leave is being made on a short-term temporary basis, a shorter period of leave should be granted appropriate to the circumstances of the case.

Otherwise, whilst the expectation is that a period of 30 months' (2.5 years') leave will normally be granted, there may be cases where evidence is provided, demonstrating that a child requires a longer period of limited leave (or ILR), in order to reflect the best interests of that individual child.

There is discretion to grant a longer period of leave, where appropriate, there may be cases where a longer period of leave to remain is considered appropriate, either because it is clearly in the best interests of the child (and any countervailing factors do not outweigh those best interests) or because there are particularly exceptional or compelling reasons to grant limited leave for a longer period, or to grant ILR.

The onus is on the applicant to establish that the child's best interests would not be met by a grant of 30 months leave to remain and that there are compelling reasons that require a different period of leave to be granted. This means that the decision-makers should only consider whether to grant a longer period of leave or ILR if (a) the applicant has specifically asked for this and (b) they have provided their reasons for why they think a longer period of leave or ILR is appropriate.

In considering the period of leave to be granted factors such as the length of residence in the UK, whether the child was born in the UK, and strong evidence to suggest that the child's life would be adversely affected by a grant of limited leave rather than ILR are relevant. The conduct of the child's parent(s) or primary carer and the immigration history and the public interest in maintaining fair, consistent and coherent immigration controls are also relevant when considering the length of leave to be granted.

Where the parent(s) or primary carer already has leave or where their application is being decided first, the period of leave granted to the parent or primary carer is relevant to the assessment of what period of leave to grant the child. Whilst it will usually be in the child's best interests to have leave in line with their parent(s) or primary carer, the decision-makers should take into account any particularly compelling factors which may warrant a longer period of leave. It should be borne in mind that the child is not responsible for the conduct

or immigration history of their parent(s) or primary carer.

An example of a case where it might be appropriate to grant a child ILR early might be where the child has a serious and chronic medical condition which could not be effectively treated in the country of proposed return such that return would breach the child's rights under ECHR Article 3 or Article 8. The child would be eligible for leave to remain. However, if there was evidence that the child was seriously distressed by the prospect of a grant of limited leave it might be concluded that it would be in the child's best interest to grant the child ILR to provide a greater degree of certainty for the purposes of their continued treatment or mental well-being. However, the threshold is high, and concerns the direct effect on the person concerned. The age of the person is only one factor in the assessment.

….

Where a decision is taken to grant ILR to a child because it is considered to be in their best interests, this does not necessarily mean that the parent(s) or primary carer should be granted ILR in line. It will normally be appropriate to grant a period of limited leave to 30 months to the parent(s) or primary carer, unless they can demonstrate exceptional and compassionate circumstances in their own right, that warrant departure from this policy.

In all cases, the onus is on the applicant (or their representative) to provide evidence as to why it is in the best interest of the child to be granted a period of leave outside the rules that is longer than 30 months. Where the decision-maker considers that there are exceptional circumstances that mean it is in the best interests of the child to depart from the policy of granting 30 months leave to remain the case must be referred to a senior caseworker to consider further.

Where granting a non-standard period of limited leave to the applicant because it is accepted that there are exceptional reasons for doing so, this leave will have to be granted outside the immigration rules as there is no provision within Appendix FM for granting limited leave for a period of more than 30 months. This also applies to ILR where this is granted outside of a valid ILR application or where the requirements of the rules are not met. If there are exceptional reasons to grant ILR. This should be granted outside the rules."

17. Having set out that policy the decision-maker then turns to assess SM's case. I set the reasoning out in greater detail below but its suffices to note here that the decision-maker takes a series of factors in turn – the family's destitution, domestic violence, the threat of forced marriage, SM's long residence in the United Kingdom, her education, her mental health issues and the bullying – and in respect of each finds that it is "not a circumstance exceptional enough" to warrant a grant of ILR. The letter concludes that settlement in the United Kingdom is a privilege, not an automatic entitlement:

> "Unless there are truly exceptional reasons, the expectation is that applicants should serve a probationary period of leave before being eligible to apply for ILR….
> …The Secretary of State considers that it would be unfair to other migrants (including children) who have to complete a probationary period before being eligible for ILR for you to be given preferential treatment, especially as no application for ILR was made. It is open to you to make an application for settlement should you consider your circumstances are particularly exceptional, compassionate or compelling".

The request is finally refused on the grounds that it is for a purpose not covered by the rules.

The Challenge

18. The Applicant contends that the decision of the Respondent was unlawful for the following reasons:

    (i) A failure to take relevant matters into account;

    (ii) The Respondent unlawfully fettering her discretion and/or failing to exercise such a discretion;

    (iii) A failure to discharge the statutory duty under s.55 of the Borders Citizenship and Immigration Act 2009;

    (iv) Irrationality;

    (v) Failure to apply and/or misinterpreting relevant published guidance

19. Ms Weston submitted that the first decision, that dated the 6th November 2017, was demonstrably flawed for all of the foregoing reasons. Contrary to the Secretary of State's stated policy it entirely failed to engage with the

explicit request made by ASIRT; it did not contain any consideration of the issues raised; the decision-maker plainly failed to exercise his discretion and the decision was reached without reference to SM's best interests.

20. The second decision, that dated the 14th April 2018, was only issued after the Applicant notified the Respondent of her intention to take these proceedings. Although it went some way to considering the issues raised by ASIRT, it is submitted that its contents still failed to meet the minimum standard of adequacy required in public law. There were numerous errors in the approach taken by the Respondent, but the headline criticism is that the letter failed to engage with the duty to consider SM's best interests; having failed to make any findings on where those best interests might lie it was not possible for the decision maker to have given lawful effect to the published policy. Ms Weston suggested that this failing is a "very real and continuing problem" in the Secretary of State's approach to cases involving children, notwithstanding clear guidance repeatedly given by the higher courts.

21. In their covering letter ASIRT had placed reliance on the decision of Holman J in SM and Others [2014] EWHC 1144 (Admin). Ms Weston accepts that the Court was there concerned with a differently worded policy but submits that the judgment nevertheless remains relevant:

> "As Holman J pointed out in SM & Others *supra*, there is an irreconcilable conflict between the duty to treat the best interests of the child as a 'primary consideration' ie only to be outweighed by an imperative of sufficient gravity, and the imposition of a 'very high', 'compelling' or 'exceptional' circumstances threshold. Were the policy to be interpreted, as here, as effectively imposing an unachievably high threshold for children's cases to meet, it would be unlawful as inadequate to meet the s.55 duty: MM (Lebanon), particularly in circumstances where the Respondent expressly relies on the residual discretion, interpreted in accordance with the s.55 statutory guidance, to meet that duty"[1].

22. The proper approach to determining where a child's best interests lie is set out by Baroness Hale in ZH (Tanzania) at paragraphs 26-28. Once those findings have been reached it is for the Secretary of State to balance them against any countervailing factors identified before reaching a final conclusion on what period of leave should be granted. Ms Weston submits that in this case the cumulative weight of the evidence strongly indicated that it would be in SM's best interests to be granted settlement in the United Kingdom. Clear reasons had been advanced as to why it would be contrary to her best interests to grant her any lesser period of leave. There were, by contrast, no countervailing factors of any significant weight. In those

[1] Para 3.19 Skeleton Argument for the Applicant

circumstances there really was only room for one view: that SM should have been granted ILR.

The Secretary of State's Defence

23. For the Secretary of State Mr Malik made three submissions.

24. His first is that in the absence of a formal, paid application for indefinite leave to remain by SM there can be no legitimate complaint that the Secretary of State did not grant such leave. The Secretary of State is obliged to apply the rules. The relevant rule for the grant of ILR on private life grounds is paragraph 276DE. Each of the requirements must be met before a grant of ILR can in those circumstances be granted. One of those requirements is [at sub-paragraph (a)] that "the applicant has been in the United Kingdom with continuous leave on the grounds of private life for a period of at least 120 months". Under paragraph 276DH of the Rules, an applicant for ILR who fails to meet all of those requirements under 276E must be refused. Further, paragraph 34 of the Immigration Rules stipulates that an application for leave to remain must be made on an application form specified for the immigration category under which the applicant is applying; where the applicant is required to pay a fee this must be paid in full in accordance with the process set out in the application form. It is unarguably open to the Secretary of State, as a matter of law, to set down such procedures in the exercise of his duty under s3 of the 1971 Act: s50 of the Immigration, Asylum and Nationality Act 2006.

25. Since it is accepted that SM has made neither an application for ILR, nor paid the fee for doing so, the Secretary of State's decision could not have been otherwise. Mr Malik relied in this regard on the decision in R (on the application of Alladin and Wadhwa) v Secretary of State for the Home Department [2014] EWCA Civ 1334 in which the Court of Appeal dismissed the case of the second applicant in the following terms [at 70]:

> "As I have intimated, a striking feature of Mr Wadhwa's case is that at no stage did he make a clear request to the Secretary of State for the grant of ILR. In those circumstances it would be wrong to criticise the Secretary of State for granting DLR in the belief that she was acceding to the only application made."

26. Mr Malik submitted that the Upper Tribunal have accepted this passage in Lord Justice Floyd's judgment to be referring to a paid, formal application for ILR: see for instance R (on the application of Amitkumar Pravinbhai Patel) v Secretary of State for the Home Department (duration of leave-policy) UKUT 00561 IAC) and R (on the application of CS) v Secretary of State for the Home Department [2016] (JR/6041/14). That being the settled position, SM's case

was over before it began.

27. The second submission for the Secretary of State is that even if the initial decision could be said to be lacking in reasons, the second decision, of the 16th April 2018, constituted a complete answer to all of the points made on SM's behalf. Clear reasons were given therein why her circumstances were not found to be sufficiently exceptional to warrant a grant of settled status. Mr Malik stressed that the discretion conferred by s3(3) of the Immigration Act 1971 is for the Respondent to exercise. This Tribunal's jurisdiction to review that exercise is, within the scope of a public law challenge, limited. Where the Secretary of State has engaged with the evidence put forward, and has given reasons for his conclusions, it is not open to this tribunal to interfere with that decision-making process. In particular the Tribunal has no power to grant indefinite leave to remain, nor to order the Secretary of State to do so: see for instance TN (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40.

28. Mr Malik further submitted that insofar as the Applicant sought to rely on the decision of Mr Justice Holman in SM and Others that reliance was misplaced, since that case was concerned with a policy that is no longer in force. Mr Malik submitted that far from setting out any general principles, Holman J was simply addressing the facts in that case, in the context of the applicable policy. The Secretary of State had amended his policy so as to comply with that judgment.

29. Finally, Mr Malik submitted that even if a public law error could be identified in the letter of the 16th April, relief should be refused on the grounds that any reconsideration by the Secretary of State would be highly likely to result in the same outcome. The policy itself makes clear that the expectation is that all migrants on the 'private life' route will be eligible to apply for settlement after 10 years. There is a clear public interest in the Secretary of State's policies, and decision making, being consistent. That is why the policy is couched in terms of exceptionality. The circumstances faced by SM did not, on any analysis, meet that high threshold.

Discussion and Findings

30. I am asked to review two successive decisions of the Secretary of State concerning the grant of leave to this minor Applicant. Permission was granted on the 28th August 2018 by His Honour Judge McKenna.

31. I am satisfied that the first decision letter, that dated the 6th November 2017, entirely failed to address the clear representations made by ASIRT. The letter addresses none of the detailed evidence supplied; nor does it give any indication that the Secretary of State has considered exercising his discretion

in the Applicant's favour, or otherwise.

32. Mr Malik did not dispute that the first letter is essentially void of reasoning, but submitted that it was nevertheless a lawful response, because there was no legal obligation upon the Secretary of State to grant ILR, nor even to consider doing so. SM had neither completed an application form for settlement, nor paid the fee to make such an application. Mr Malik submits that in those circumstances the Secretary of State was not only alleviated of any responsibility to consider granting settlement, but was in fact bound, by the terms of the rules, to refuse to grant ILR.

33. In respect of applications made under the Rules, Mr Malik is of course quite correct. Paragraph 276DE(a) requires applicants to demonstrate that they have held continuous leave for a period of 10 years before settlement will be granted; paragraph 276DH mandates that any applicant who cannot meet that test must be refused. Paragraph 34 stipulates that applications under any given category of leave under the rules must be made on the correct form, and the correct fee paid. All of that is true. SM could not meet the test at 276DE(a), so she did not bother completing the form prescribed in accordance with paragraph 34.

34. That is not however the end of the matter. That is because the application made by SM was made squarely *outside* of the Rules. Section 3 of the Immigration Act 1971 (as amended) provides:

> **3 General provisions for regulation and control.**
>
> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen-
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (2)The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

…

35. It is uncontroversial that the discretion conferred by s3(1)(b) is not fettered by s3(2): whilst the Rules are the primary statement of policy as to how the Secretary of State will administer his duties, he retains a residual discretion that operates outwith that framework. It was that discretion that SM asked the Secretary of State to exercise.

36. I have been taken to nothing in statute or policy that restricted her ability to do so; in particular I have found no support for Mr Malik's contention that the Secretary of State could properly decline to respond to SM's request because she hadn't filled in a specific form. Mr Malik relied upon Alladin to submit that the Court of Appeal there required the claimant to have made such a formal application; he further relies upon Patel and CS to submit that the Upper Tribunal prefers the interpretation of Alladin he advances.

37. I am not satisfied that any of these authorities support his proposition. The high point of Mr Malik's case appears in the headnote of Upper Tribunal Judge Eshun's decision in Patel:

> "*There is no obligation on the Secretary of State to grant ILR or to consider granting ILR in circumstances where no formal application for ILR has been made*"

38. Insofar as the words "formal application" could be read there to mean a valid application as defined at paragraph 6 of the Immigration Rules, that headnote is unfortunately misleading. Nothing in the body of the judgment itself indicates that Judge Eshun believed that to be the case. The applicants in Patel were a family whose cases had been returned to the Secretary of State for consideration after the First-tier Tribunal had allowed their linked appeals on human rights grounds. The Secretary of State had, in accordance with the Rules, granted each member of the family a period of 30 months' Discretionary Leave. The family had sought to judicially review that decision. Dismissing their claims, Judge Eshun accepted the Secretary of State's argument that their case was on fours with that of Mr Wadhwa, the second appellant in Alladin, whose appeal had been rejected by Lord Justice Floyd in the following terms:

> "As I have intimated, a striking feature of Mr Wadhwa's case is that at no stage did he make a clear request to the Secretary of State for the grant of ILR. In those circumstances it would be wrong to criticise the Secretary of State for granting DLR in the belief that she was acceding to the only application made."

39. Note the language used: "at no stage did he make a clear *request*". Note the context: Alladin and Wadhwa's appeals both concerned the exercise of discretion outside of the rules. It is perfectly clear, from both that language

and context, that the point was not that Mr Wadhwa had failed to make a formal *application* for ILR, but that he had failed to even *ask* the Respondent to exercise his discretion in his favour before complaining about his failure to do so. In those circumstances his challenge was unarguable. So too was the case for the Patels, who had similarly failed to make a specific request that the Secretary of State depart from the 'standard' grant of 30 months. As such the words "formal application" in the headnote of Patel should more accurately read "formal request".

40. This interpretation is consistent with the decision of Upper Tribunal Judge Smith in CS, and indeed with the Secretary of State's own in this case, since it is apparent from the letter of the 16th April 2018 that the Secretary of State understood ASIRT to have made such request, and to have exercised his discretion 'outside of the rules' in responding to it. It is further consistent with the terms of the policy itself, which makes clear that it is not only open to applicants for discretionary leave to request that a longer period of leave is granted, but that where such a request is made, the Secretary of State is obliged to consider it:

> "If the applicant specifically requests a longer period of leave than 30 months, or ILR, and provides reasons as to why they think a longer period of leave or ILR is appropriate in their case, the decision maker must consider this and set out in any decision letter why a grant of more than 30 months or ILR has not been made".
>
> (my emphasis)

41. See further Behary and Anr v Secretary of State for the Home Department [2016] EWCA and Asiweh v Secretary of State for the Home Department [2019] EWCA Civ 13 in which the Court of Appeal confirmed:

> "It is clear that when the Secretary of State is expressly asked to exercise his discretion to grant leave to remain outside of the Immigration Rules he is under a duty to do so".

42. For the foregoing reasons I am satisfied that Mr Malik's submission is no answer to SM's criticisms of the decision of the 6th November 2017. That decision was unarguably flawed for all the reasons identified in the Applicant's grounds.

43. The second letter is dated the 16th April 2018. It was drafted in response to a letter before action and contains, unlike the first, actual reasoning.

44. At the centre of SM's complaint about his second decision is the Secretary of State's duty arising under section 55 of the Borders Citizenship and

Immigration Act 2009:

> **55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official.
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)

45. Any published policy, be it a rule or a guidance document, must on its face be compliant with the s.55 duty. Beyond that, s.55 imposes upon decision-makers a duty to *apply* policy in a manner compliant with the stated statutory aim: R (SM and Others) v Secretary of State for the Home Department [2013] EWHC 1144 (Admin). Because the duty applies to "any function" the Secretary of State must consider it at all stages of the process: R (Granovski) v Secretary of State for the Home Department [2015] EWHC 1478. In SM Holman J identified that in a case such as this, that would require the decision maker to ask himself whether leave should be granted at all, and if so, of what duration: at both stages the best interests of any children involved would have to be a primary consideration.

46. Treating 'best interests' as a primary consideration does not require decision makers to treat them as a 'trump card'. As Baroness Hale emphasised in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, 'primary' means that they must be considered first, so that the findings of that enquiry can inform all subsequent conclusions. It is not the same as

'paramount': the best interests of a child can be outweighed by the cumulative effect of other considerations. In ZH "the countervailing factors were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the tribunal rightly pointed out, the children were not to be blamed for that" [at §33].

47. There can be no dispute that the policy applied to SM's case recognised the duty arising under s.55. Nor am I satisfied that on its face the policy impermissibly conflates the 'best interests' assessment with the exceptional or compelling factors that an adult would need to demonstrate, since a clear distinction is drawn between the two:

> "there may be rare cases in which either a longer period of leave or an early grant of ILR is considered appropriate, ***either*** because it is clearly in the best interests of a child (and any countervailing factors do not outweigh these best interests) ***or*** because there are other particularly exceptional or compelling reasons to grant leave for a longer period (or ILR)…
>
> ***In cases not involving children*** (as the main applicant or as family members included in the application), there must be sufficient evidence to demonstrate the individual circumstances are not just unusual but can be distinguished to a high degree from other cases the extent that it is necessary to deviate from the standard grant of 30 months leave to remain…
>
> ***In cases involving children*** (as the main applicant or as family members included in the application), the decision-maker must also have regard to the best interests of the child as a primary consideration (but not the only or the paramount consideration) when deciding the period of leave to be granted.
> …
> (emphasis added)

48. The questions for the decision maker in this case were therefore:

    i) Was it clearly in SM's best interests to grant her indefinite, rather than limited, leave;

    ii) If yes, were there nevertheless countervailing factors capable of displacing those best interests such that a 'standard' grant of leave would remain appropriate.

49. Ms Weston's case that the decision of the 16th April 2018 nowhere answers the first of these questions, and as a result any purported answer to the second

would be incomplete. Mr Malik contends that the letter adequately addressed all of the issues raised.

50. The case put on SM's behalf, first in the initial request by ASIRT, and then in the letter before action submitted by Central England Law Centre, was that SM has already suffered a series of traumas in her life: her parent's divorce and consequent custody battle, her witnessing of domestic violence by successive partners of her mother, destitution and deprivation, emotional abuse by her step-father, insecurity, the threat of forced marriage and dislocation from her father. These historical stresses – if I may put it like that - were the background to the current challenges that this child faced, principally bullying at school, her sense of insecurity and her own persistent self-harming. Her school, mother, GP and Birmingham City Council Children's Services had all repeatedly expressed concern about her mental health issues. SM herself explained her self-harming as follows:

> "…I know that it is wrong and I know that it upsets my mum but it is something that I know I can do to give me a release and make me feel that I am the one who is making decisions. I have never been able to make decisions and I have always had to watch other people make decisions for me and my mum including the court and the Home Office and my dad and other members of the family and the community".

51. The detailed reasons given in response were as follows:

> "Whilst your family were considered to be destitute following the breakdown of your mother's relationship with her second husband, you and your mother have been granted leave to remain in the UK with a condition of stay permitting recourse to public funds. It is therefore considered that you will have appropriate access to sources of benefits and accommodation as your entitlements permit and which should alleviate some of the concerns you have about your status in the UK. It is not accepted that having been declared destitute, and since being given permission to remain in the UK with access to public funds, is a circumstance exceptional enough to warrant granting you ILR. Many other migrants are in the UK who are being supported by local authorities as destitute persons, or who have limited leave to remain with the recourse to public funds, (and in many instances without such a recourse): none of those persons have any automatic entitlement to ILR because of that. It is also noted that your mother is educated to Masters degree level, and therefore she has the potential to seek to and secure gainful employment to reduce the reliance on public funds and overcome the family's feelings of being destitute."

Whilst you may have suffered from being in households where there have been histories of domestic violence and abuse, it is not accepted that this is a reason to grant you ILR. As perturbing as it is in the modern world that domestic violence and abuse continues, it is not considered an exceptional circumstance where someone does not qualify for ILR under the Immigration Rules as a victim of domestic violence for the Secretary of State to derogate outside the standard grant of 30 months leave to remain (where someone has been permitted to remain in the UK on the basis of their family and/or private life).

Whilst concerns have been raised about you being potentially inducted into a forced marriage by your own father, as you are currently permitted to remain in the UK there is no reason for you to return to Pakistan where you would be at such a risk. You and your mother have no reason to inform your father of your current residence in the UK such that you may be at harm of extended family members or friends of your father who may be in, or come to, the UK to seek your marriage against your will. If any such incidents did occur, it would be open to you and your mother to report such matters to the relevant authorities. Furthermore, no cogent reason has been forwarded as to why granting you ILR would protect you from being forcibly married. Assuming you have no intention of returning to Pakistan as a single woman where you may be in danger, if you continue to meet the requirements of further leave to remain in the UK relative safety is secured whilst you remain here. Your concerns about being forcibly married are therefore not seen as an exceptional circumstance warranting a grant of ILR.

Whilst you have been in the UK since you were three years old and have British citizen siblings, this is not considered an exceptional circumstance to grant you ILR. With current migration trends there are many families in the UK where some family members are settled here or who are British citizens and other family members who are not, the latter of which may be going through the same probationary period of limited periods of leave to remain until they become entitled to apply for ILR.

Whilst the desire has been expressed to grant you ILR so as not to prolong instability and precariousness which has characterised your life to date, it has not been borne out how a

grant of ILR would ameliorate the range of mental health issues that you have. You have been granted limited leave to remain in the United Kingdom with access to public funds. As long as your circumstances remain the same and do not engage in any activity that would deem you unsuitable to be here, your status upon review should remain the same and you will face no unnecessary hardship as a result of having limited leave to remain.

It is further noted that you have been recommended the counselling because of your various psychological problems and other person with limited leave to remain in the UK, you would be able to access such treatments by the NHS and will not therefore be disadvantaged as a result of having such limited leave to remain.

52. The letter then sets out some observations about the provision for tertiary education before continuing:

"Whilst it has been stated that you have been subject to bullying because of your immigration status it is noted that in your legal representatives Pre-Action Protocol letter of 5 January 2018, it is stated that you rarely disclose your immigration status to anyone even your close friends. If that is the case, it would seem contradictory to assert that you are being bullied over your immigration status if you rarely disclose this information. Living in Birmingham, which has a large resident migrant population, it would seem doubtful that you attend a school where you are or have been the only person who has been a migrant to the UK, and whose immigration status may be perceived as being precarious. The Secretary of State would contend that your immigration status would not be a significant factor, if any, that would lead you to being bullied, but may be more predicated on matters that teenagers perceive as being divisive and which fosters what seemed an unfortunate pervasive and pernicious bullying culture prevalent in today's society (particular within schools). As your school is aware of matters of you being bullied, it is considered that the appropriate authority is at immediate hand during school time to address issues of bullying within their sphere of influence. It is not considered that this is an exceptional circumstance warranting a grant of ILR to yourself, or that granting ILR would alleviate any bullying that you unfortunately suffer.

Whilst the victim support and GP letters indicate that you

should be allowed to remain in the UK on a permanent basis, the Secretary of State considers the context of their use of "permanent" in those letters as not one expressing that you should be granted ILR, but that it would not be in your interests to be forced to return to Pakistan. If the Secretary of State is wrong in that contention, neither victim support or your GP have provided any cogent reasons why granting ILR to yourself would solve your mental health issues. It is also the Secretary of State's contention that in discussing your situation with Victim Support and your GP it is likely that any discussion that you would like to be granted ILR would be reconfirmed by them to us solely as an expression of your desire. It would be expected otherwise (and which is lacking) clear and meticulous reasoning as to why granting you ILR is the only solution to solving your problems and concerns.

It must be reiterated that settlement in the UK is a privilege, not an automatic entitlement. Unless there are truly exceptional reasons, the expectation is that applicants should serve a probationary period of limited leave before being eligible to apply for ILR if they meet the requirements.

It is further noted that you did not apply for ILR but made an application for limited leave the Secretary of State considers that it would be unfair to other migrants, including children who have to complete a probationary period before being eligible for ILR used to be given preferential treatment, especially as an application for ILR was made. It is open to you to make an application to settlement….

53. I accept that this second letter is considerably better than the first. The decision-maker has acknowledged the evidence submitted and has engaged with the request to grant settlement. The Secretary of State has exercised his discretion, and as Mr Malik properly reminded me, that is a matter for him. I did not however understand it to be Ms Weston's case that this Tribunal should simply supplant the Secretary of State's exercise of discretion with its own. It is firmly established that this would be impermissible: see for instance Alladin, TN (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40, R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546. My task is limited to identifying whether the decision is flawed for any of the public law errors alleged by SM, and if so whether relief should be granted.

54. The first thing to be said about the reasoning in the letter is that I am unable to identify any analysis therein of the Applicant's best interests. This is a striking omission given the language of the policy, and the terms upon which

the case was advanced by ASIRT. Mr Malik sought to ameliorate that defect by pointing to the fact that the decision-maker does address in turn each of the factors raised on behalf of SM, and asked me to read those passages as amounting to a best interests assessment.

55. I am unable to do so.

56. What ASIRT, and subsequently Central England Law Centre did, was to set out the series of challenging life events that have led to SM being the particularly vulnerable child that she is today. What the Secretary of State did was to take each of the individual traumas and consider it in isolation before concluding: "*it is not considered that this is an exceptional circumstance warranting a grant of ILR*". Having thus dismissed the relevance of each discrete experience the decision-maker nowhere engages with the *consequences* of this personal history for SM. There is no global appraisal of the evidence. It is difficult to conceive of a case where this would not be an error in approach, but in a case such as this, which rested on the accumulative toll of these life events, it rendered the decision nonsensical. It was never SM's case that any *one* of these factors should lead the Secretary of State to grant her leave: it was her case that 12 years of successive traumas had left her particularly vulnerable and frightened about her lack of settled status.

57. This brings me to the central flaw in the Secretary of State's letter. The decision-maker repeatedly employs the language of exceptionality. Had he there sought to reflect that this would have to be a case out of the normal run of things to justify departure from the Rules, that would be legally permissible. It is however clear from the reasoning that the decision maker does not use the term it in that sense. It instead appears that he was looking for something *unique* in the Applicant's circumstances:

> "Many other migrants are in the UK who are being supported by local authorities as destitute persons…none of those persons have any automatic entitlement to ILR because of that…."
>
> "There are many families in the UK where some family members are settled here or who are British citizens and other family members who are not…."
>
> "Living in Birmingham, which has a large resident migrant population, it would seem doubtful that you attend a school where you are or have been the only person who has been a migrant to the UK, and whose immigration status may be perceived as being precarious".

58. I am satisfied that in approaching his task in this way the decision-maker appears to have misunderstood, or misapplied, the policy that framed his

decision, by failing to recognise that the applicant was a *child*. The policy does not confine the grant of ILR to children who can demonstrate that a very high or 'exceptional' threshold is reached – to do so would of course undermine the very principle of s.55. For that reason, the policy draws clear distinction between adult and child. In respect of adults, decision-makers are instructed not to grant a longer period of leave unless the applicant can demonstrate that his circumstances "are not just unusual but can be distinguished to a high degree from other cases": this would appear to have been the approach adopted in SM's case. But SM was not an adult. She did not have to show that she was unique, or that no other children were suffering in a manner comparable to her. She simply had to demonstrate (as a preliminary matter) that it was clearly in *her* best interests to grant her indefinite, as opposed to limited, leave to remain.

59. For the foregoing reasons I am not satisfied that the decision-maker understood that to be the task before him. I am therefore satisfied that the decision was flawed *inter alia* for a failure to discharge the statutory duty under s.55 of the Borders Citizenship and Immigration Act 2009, and for a failure to apply and/or a misinterpretation of the Secretary of State's published policy.

60. Mr Malik's final defence submission was that should this be my finding, I should nevertheless refuse to grant relief on the grounds that even absent the defects in the decisions, the outcome was highly likely to have been the same. Ms Weston, by contrast, invites me to find that on the facts presented, there really is only room for one view: that ILR should have been granted.

61. The Secretary of State's policy, expressed in both rule and guidance, is that where an applicant, be they adult or child, is found to qualify for leave to remain on Article 8 grounds, the appropriate grant of leave will *normally* be 30 months. At the end of that period the applicant can make an application for further leave, and if he or she still qualifies, a further grant of 30 months will be made. This process is then repeated on two further occasions until the applicant has accrued the requisite period of 120 months continuous residence; it is only at that point that the Secretary of State would normally consider granting ILR. Whether decision-makers should depart from that norm, and grant a longer or indefinite period of leave before the 10 year mark is reached, is dependent upon a number of factors.

62. The first is whether the applicant has specifically requested that the Secretary of State grant a 'non-standard' period of leave. I am wholly satisfied that SM did so. The letter from ASIRT was set out in clear terms and was supported by detailed submissions and corroborative evidence.

63. The second question is whether, having conducted a holistic assessment of the evidence presented, it could be said that it was clearly in SM's best interests to

be granted ILR. I need not rehearse all of the sad facts elucidated by ASIRT. The point that was being made was that this is a child who has in the past suffered a number of difficult and traumatic experiences. The consequence of that past is that she is at present a child who is finding it very difficult to cope. She is, as her Deputy Headteacher attests, a bright child who has the potential to thrive. The troubling import of all of the evidence is however that she is unable to do so because of a prevailing sense of insecurity and instability in her life.

64. In her witness statement dated the 29th January 2018 the Applicant explains the "hatred" she feels towards her green Pakistani passport and how she only now identifies as British:

> "My experience of the immigration system up to now has been extremely stressful, and I have just felt really insecure for the past 12 years. It is always at the back of my head. I feel like I am regarded by the United Kingdom's authorities as 'not belonging' but I very much regard myself as a British national and I don't identify with anywhere else and cannot see myself living anywhere other than here".

She further sets out her fears of being seen as a 'freshie', how her 'secret' has impacted upon her relationships with her peers and gives instances where her sense of insecurity about her immigration status has directly led to her self-harming by cutting herself with a razor blade.

65. The Secretary of State, in the letter of the 16th April 2018, appears to diminish the weight to be attached to that evidence on the basis that any fears that SM might hold about her long-term future are not well-founded. Adverse commentary is also offered about why bullies at school would know about the Applicant's status. Insofar as the latter issue is concerned, it is clear from her statement that there is no contradiction in the evidence. The Applicant confided in a close friend, that information was leaked, and it ended up being used against her in verbal taunts and online messages described by her Deputy Headteacher as "nasty". I am quite satisfied that there was no logical basis to reject SM's evidence. She did not need to establish that her fear – for instance of forced marriage – was objectively well-founded. The point was that she was experiencing a subjective response to external stimuli, chief amongst them being her precarious immigration status.

66. That SM finds her ongoing experience to be "extremely stressful" is entirely consistent with the findings of the Office of the Children's Commissioner in their August 2017 literature review '*Children's Voices: A review of the evidence on the subjective wellbeing of children subject to immigration control in England*':

> "Children subject to immigration control, and particularly

> those awaiting a decision or on a short term period of leave to remain in the UK, reported experiencing high levels of anxiety, stress and fear in relation to their insecure immigration status, their uncertainty about their future in the UK and the possibility of being forced to return to their countries of origin. The trauma caused by living in a 'state of limbo' emerged as the dominant source of stress and anxiety in migrant children's lives, and the most important determinant of their wellbeing. It also reduced their ability to recover from trauma they had experienced in the past.
>
> Children overwhelmingly perceived their immigration status as outside of their control, and as a result felt powerless, stripped of their agency, and forced to live in sort of limbo, passively awaiting a decision"

67. It is now trite that an important part of the best interests assessment is discovering the child's own views. This is underlined by the Supreme Court in ZH (Tanzania) [at §34]. In the policy published to coincide with the coming into force of s55 UKVI staff were instructed that the following should be taken into account in order to safeguard and promote the welfare of children:

    - Children and young people are listened to and what they have to say is taken seriously and acted on

    - Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her.

68. The wishes and feelings of SM could not be plainer. They were an important part of the 'best interests' assessment.

69. The Secretary of State was not asked, however, to depart from the Rules on the strength of SM's evidence alone. Her statement was supported by cogent external evidence, including the information provided by her Deputy Headteacher, her GP and the specialist Victim Caseworker tasked with supporting SM through the bullying. Three clear points emerge from the evidence of these independent witnesses: that the Applicant is extremely vulnerable, that her mental health issues are significant (and in fact deteriorating) and that she would immediately benefit from a grant of indefinite leave because this would alleviate a good deal of the stress that she is experiencing.

70. The question for the decision-maker was whether, taking all of that into account, it was clearly in SM's best interests to be granted indefinite rather than limited leave. The Secretary of State's view, as expressed in the policy

provided:

> "if there was evidence that the child was seriously distressed by the prospect of a grant of limited leave it might be concluded that it would be in the child's best interest to grant the child ILR to provide a greater degree of certainty for the purposes of their continued treatment or mental well-being".

71. There was evidence which indicated that in SM's own view, and in the view of professionals working with her, her serious stress and mental health issues would be alleviated by a permanent grant of leave. There was evidence which indicated that the precariousness of her situation was not only causing SM anxiety but had been used by others (her former stepfather, peers at school and online) to psychologically abuse and bully her. There was, importantly, also clear evidence that SM's immediate family were in the United Kingdom and were overwhelmingly likely to remain here. Her two younger brothers are British and their father resident here; as such her mother continues to qualify for leave and is on a path to settlement. All of that evidence pointed one way: it was clearly in SM's best interests to grant her indefinite leave to remain today. If there was evidence to the contrary, it was not brought to my attention.

72. The third question for the decision-maker was whether there were countervailing factors of sufficient weight to displace SM's best interests. Given the Secretary of State's recognition of SM's Article 8 rights she cannot lawfully be removed from the United Kingdom; given the nationality of her minor brothers, and position of her mother, it is extremely unlikely that this will at any point become the case. It is very difficult in those circumstances to see that the ordinarily powerful public interest in 'maintaining immigration control' would here be particularly relevant. Mr Malik emphasised, however, the strong public interest in the outcome of such applications being decided in a consistent and predictable way, in line with the clear statement of policy set out in the Immigration Rules. In his decision of the 16th April 2019 the Secretary of State suggested that "it would be unfair to other migrants (including children) who have to complete a probationary period before being eligible for ILR for [SM] to be given preferential treatment". I accept that that is an important consideration. It will however only be unfair to other children who are in a comparable situation to that which SM unfortunately finds herself in. It cannot logically be said to be unfair to children who are unable to demonstrate that their best interests require a longer, or indefinite, grant of leave.

Conclusion

73. The decisions of the 6th November 2017 and 16th April 2018 are quashed.

74. The Respondent is ordered to reconsider the Applicant's request for indefinite leave to remain in accordance with the policy considered herein, with his obligations under s.55 of the Borders Citizenship and Immigration Act 2009, and with the terms of this judgment.

Upper Tribunal Judge Bruce
6th June 2019

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).